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AUG 11 2003

No. 03-66

IN THE

Supreme Court of the United States

KISKA CONSTRUCTION CORPORATION – U.S.A. AND KAJIMA ENGINEERING AND CONSTRUCTION, INC., PARTNERS IN KISKA-KAJIMA, A JOINT VENTURE,

Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether after a five-week trial on its contract claims, Petitioner should have a second opportunity to litigate the same factual allegations in tort despite WMATA's sovereign immunity from such tort claims.

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STATEMENT OF THE CASE

Respondent Washington Metropolitan Area Transit Authority ("WMATA") is an agency and instrumentality of Maryland, Virginia and the District of Columbia, authorized by Congress. *See* Pub. L. No. 89-774, 80 Stat. 1324 (1966). Since its creation in 1966, WMATA has designed and operated a mass transit system for the public. During this time, it has awarded contracts to construct portions of the public subway system. On occasion, disputes have arisen under these contracts. As provided in the contracts, the contractors have the right to bring disputes to a board of contract appeals. Less frequently, contractors have asserted breach of contract claims to district courts. In this case, Petitioner asserted breach of contract claims and a unilateral mistake claim against WMATA based on alleged concealment of material information. Petitioner specifically asserted breach of contract claims based on failure to disclose superior knowledge and breach of the duty of good faith and fair dealing. Those claims were presented to a jury during a five-week trial, and the jury entered judgment against Petitioner and in favor of WMATA.

The district court dismissed Petitioner's tort claims, which were predicated on the same facts as were its contract claims. Petitioner complains that it was improperly deprived of the opportunity to argue that WMATA's alleged concealment of material information constituted fraud and misrepresentation, even though it was permitted to argue that that act was a breach of the obligation to disclose superior knowledge and a breach of the duty of good faith and fair dealing.

Obviously, Petitioner had a remedy for its claims of concealment and exercised that remedy.[1] Petitioner has no

1. The trial judge instructed the jury to find a breach of contract if the specifications were not adequate or complete or if WMATA (Cont'd)

right to a second bite at the apple. The district court and D.C. Circuit each properly applied WMATA's Compact, which expressly provides that WMATA "shall not be liable for any torts occurring in the performance of a governmental function." *See* D.C. Code § 9-1107.01(80). In so doing, both courts followed the law on sovereign immunity for WMATA that Petitioner admits has been settled since the 1987 decision in *Sanders v. WMATA*, 819 F.2d 1151 (D.C. Cir. 1987). Pet. at 14. In so doing, both courts used the discretionary/ ministerial distinction of the Federal Tort Claims Act ("FTCA") as a tool in determining whether the challenged activity was governmental.[2] Both courts determined that WMATA's decision not to include certain documents in bid packages[3] provided to prospective contractors was a governmental function that could be the subject of an action for breach of contract but could not give rise to tort liability.

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failed to disclose vital information. D.C. Cir. J.A. at JA524; 529-33. The trial judge also instructed the jury to find a unilateral mistake if WMATA knew that Petitioner bid without access to vital information that WMATA had. D.C. Cir. J.A. at JA536-37. Clearly, the jury was not persuaded by Petitioner's assertions of wrongdoing.

2. And, despite its challenge now, Petitioner embraced the use of that distinction in its brief to the D.C. Circuit. *See* D.C. Cir. Br. for Appellants at 20-26.

3. The record before the trial court showed that the GZA GeoEnvironmental, Inc. reports that Petitioner alleged had been concealed were draft reports, had been superceded and had been made available for review by Petitioner. *See* D.C. Cir. J.A. at JA585 and JA587; JA492-93; *see also* JA506-07 and JA509.

The D.C. Circuit correctly decided the case. Petitioner already had its day in court. There is no basis for the Supreme Court to revisit the law of sovereign immunity for WMATA. That law has very limited application, has been settled for over 15 years and has been applied consistently by the federal circuits.

REASONS FOR DENYING THE PETITION

In this case, the Petitioner had a five-week jury trial on its claims of unilateral mistake and material breach of contract. And, although Petitioner's tort claims were dismissed before trial, the district court expressly permitted Petitioner to introduce the "same set of facts" that Petitioner alleged supported its claims of fraudulent misrepresentation and negligent misrepresentation. *See* Pet. App. 29a. Indeed, every factual allegation that Petitioner argued supported its misrepresentation claims was incorporated by reference into the unilateral mistake count that was heard by the jury. *See* Pet. App. 68a at ¶ 237 and ¶ 241; *see also* Pet. App. 70a. Also, in his closing argument, counsel for Petitioner argued that Respondent WMATA had "misrepresented and lied" and engaged in "systematic and intentional lies and concealments of vital information." *See* D.C. Cir. J.A. at JA559 and JA540. The jury rejected Petitioner's claims and judgment was entered for WMATA. The D.C. Circuit affirmed that judgment.

Despite the above, Petitioner asserts that it was "denied its day in court on tort claims under an immunity analysis . . . ." Pet. at 19. Specifically, Petitioner argues that in finding that WMATA had sovereign immunity from the tort claims, the D.C. Circuit applied the wrong standard. Petitioner also argues that the court's decision gives WMATA "discretion" to commit fraud by concealing material information from its contractors.

The Petition should be denied because the factual allegations of fraud, misrepresentation and concealment were heard by the jury as an alleged breach of contract for WMATA's purported failure to disclose superior knowledge and as part of Petitioner's unilateral mistake claim. *See* Pet. App. 70a at ¶ 248.a; Pet. App. 69a at ¶ 241. Petitioner had its day in court on those claims and lost. There has been no miscarriage of justice. The Petition also should be denied because there is no split in circuits and the case involves a unique and unusual issue of law that only has applicability to solicitations let by WMATA. In addition, although the district court properly utilized the discretionary/ministerial distinction (the alleged wrong standard) as an aid in applying the governmental/proprietary test, Petitioner did not argue to the D.C. Circuit that the discretionary/ ministerial test was the wrong standard. In fact, at the D.C. Circuit, Petitioner argued that its tort claims should not have been dismissed because they alleged conduct "beyond the scope of the 'discretionary function' exception to sovereign immunity . . . ." D.C. Cir. Br. for Appellants ("Appellant Br.") at 26. And, Petitioner never even cited *Sanders v. WMATA*, 819 F. 2d 1151 (D.C. Cir. 1987) to the D.C. Circuit — even though it is that case that Petitioner now attacks and asks this Court to reverse. Respondent submits that the Court should not entertain an issue that Petitioner could have presented below but failed to raise.

The D.C. Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the petition for writ of *certiorari*.

I. THE PETITION'S ATTACK ON THE USE OF THE DISCRETIONARY/MINISTERIAL DISTINCTION WAS NOT PRESENTED TO THE D.C. CIRCUIT

In its decision dismissing Petitioner's tort claims on sovereign immunity grounds, the district court noted that when a "quintessential" governmental function is not at issue, "the D.C. Circuit draws upon the Federal Tort Claims Act's dichotomy between 'discretionary' and 'ministerial' acts" to determine whether a challenged activity is governmental. Pet. App. 26a. The district court then applied the discretionary/ministerial test to Petitioner's tort claims and found that application of that test required dismissal of Petitioner's tort claims. Pet. App. 26a-28a. Despite that, at the circuit court level, Petitioner did not argue that the district court had improperly utilized the discretionary/ministerial test or had replaced the government/proprietary distinction with the discretionary/ministerial distinction. Instead, Petitioner embraced the distinction in the FTCA (Appellant Br. at 20) and argued that "because KiSKA's complaint alleges tortious conduct by WMATA beyond the scope of the 'discretionary function' exception to sovereign immunity, the district court erred by dismissing those tort claims on the pleadings." Appellant Br. at 19-26. Because Petitioner did not present the first question in its Petition to the D.C. Circuit, it should not be permitted to first raise this issue before the Supreme Court. *See Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.") (citing *Duignan v. United States*, 274 U.S. 195, 200 (1927)); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 330 (1967); *United States v. Lovasco*, 431 U.S. 783, 788 (1977); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to hear "new substantive

arguments attacking, rather than defending, the judgment when" arguments were not presented below).[4]

II. THE PETITION ADMITS THAT THERE IS NO SPLIT IN THE CIRCUITS

Petitioner asks the Court to review the D.C. Circuit's alleged improper use of the discretionary/ministerial test to determine whether the challenged activity was governmental, and thereby subject to WMATA's sovereign immunity. However, Petitioner concedes that there is no split in the federal circuits regarding the use of that standard. The Petition admits that both the Fourth Circuit and the D.C. Circuit agree that WMATA's immunity from tort claims should be analyzed in light of the legal principles of the FTCA. Pet. at 18. There is no split in circuits that would justify Supreme Court review.[5]

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4. Moreover, contrary to Petitioner's assertion, the D.C. Circuit did not replace the governmental/proprietary distinction with the discretionary/ministerial test. Instead, the discretionary/ministerial test was properly used as an aid to determine whether WMATA's project planning activities were governmental. *See, e.g., Burkhart v. WMATA*, 112 F.3d 1207, 1216 (D.C. Cir. 1997) (noting that the court has "developed two alternative tests for identifying 'governmental' functions under the WMATA Compact.")

5. The D.C. Court of Appeals also has adopted the use of discretionary/ministerial distinction from the FTCA for purposes of analyzing whether the challenged activity is governmental and whether WMATA enjoys sovereign immunity for challenged actions. *See* Pet. at 19 n.3 (citing *McKethean v. WMATA*, 588 A.2d 708, 712-13 (D.C. 1991)).

III. THE PETITION DOES NOT PRESENT AN IMPORTANT ISSUE AND THE CASE WAS CORRECTLY DECIDED

Petitioner argues that by holding WMATA has sovereign immunity from claims that it tortiously concealed material information, the D.C. Circuit gave WMATA discretion to commit fraud. The D.C. Circuit did no such thing. The court only found that dismissal of Petitioner's tort claims was proper. The court expressly found that "the covenant of good faith and fair dealing undoubtedly constrains WMATA's behavior within the context of its contractual relationships . . . ." Pet. App. 12a. Moreover, as this case illustrates, a remedy is available in contract for any contractor that alleges failure to disclose superior knowledge or breach of the duty of good faith and fair dealing. *See* Pet. App. 29a; *see also* Pet. at 22 and cases cited in the first full paragraph therein. As acknowledged by Petitioner, those cases all were contract actions brought for breach of the duty to fully disclose facts. *See* Pet. at 22. Thus, the Petition does not present a case where WMATA is free to conceal material information. A party alleging concealment has a clear remedy for that claim.[6]

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6. Petitioner also cited cases applying New Jersey, Michigan and Missouri law to argue that certain states recognize a *tort* duty not to conceal and/or misrepresent material information. Pet. at 22 n.4. Petitioner's reliance on the cited cases is misplaced. First, the cited cases do not address the extent of WMATA's sovereign immunity. Moreover, *P.T.&L. Constr. Co. v. New Jersey*, 531 A.2d 1330 (N.J. 1987) states that the contractor "brought action against the DOT *for breach of contract*." *Id.* at 1330 (emphasis added). *Earl L. Reamer Co. v. City of Swarz Creek*, 256 N.W.2d 447, 450 (Mich. Ct. App. 1977) does not indicate whether the cause of action sounded

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Similarly, the Petition presents an unusual and unique issue limited to a single, local governmental entity — WMATA. Interpretation of the WMATA Compact has no applicability to federal government contracts, state government contracts, local government contracts or commercial contracts.

In any event, the district court and D.C. Circuit correctly decided the case. As a practical matter, when WMATA prepares a solicitation for a large construction contract, it must review tens of thousands of pages of information and determine what to include in the solicitation package. The contents of WMATA's bid packages are not specifically prescribed by any statute, regulation or policy. *See* Pet. App 12a and 27a. Thus, discretion must be applied as to what to include in and exclude from such packages. And, such discretionary decisions are "susceptible to policy judgment" requiring "consideration of budgetary constraints and

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in tort or contract. However, the cases relied on by the *Reamer* court in finding municipal liability were based on breach of contract and implied warranty theories — not tort. *See Valenti v. City of Adrian*, 79 N.W.2d 885, 892 (Mich. 1973); *Holloway Constr. Co. v. State of Michigan*, 205 N.W.2d 575, 584 (Mich. Ct. App. 1973); *see also W.H. Knapp Co. v. State*, 18 N.W.2d 421, 421 (Mich. 1945) (noting that "[p]laintiff does not count on tort" in asserting its claim). Finally, while *City of Columbia, Missouri v. Paul N. Howard Co.*, 707 F.2d 338 (8th Cir. 1983) indicates that a misrepresentation claim against a Missouri city may sound in tort, Missouri's sovereign immunity law was not considered by the court. In fact, Missouri courts specifically have noted that "the doctrine of sovereign immunity precluded a cause of action ex delicto (fraudulent misrepresentation)." *See Ideker, Inc. v. Missouri State Highway Commission*, 654 S.W.2d 617, 621 (Mo. Ct. App. 1983); *see also Missouri Consol. Health Care Plan v. Cmty. Health Plan*, 81 S.W.3d 34, 37-39 (Mo. Ct. App. 2002).

economic expediency." *Id.* at 15a and 28a.[7] As the D.C. Circuit correctly noted, if WMATA were required to include "unreliable or mistaken reports indicating an inflated need for dewatering wells, for example" in its bid packages, "the reports could cause contractors to similarly inflate their bids." *Id.* at 15a. Petitioner's position "would permit endless contractor challenges to WMATA's final specifications." *Id.* Such decisions can be reviewed without resort to tort claims.

Waivers of sovereign immunity are narrowly construed. *See, e.g., Rose v.* Rose, 481 U.S. 619, 635 (1987); *Flora v. United States*, 357 U.S. 63, 65 (1958), *reh'g granted*, 360 U.S. 922 (1959), *aff'd*, 362 U.S. 145 (1960). Here, the D.C. Circuit correctly interpreted WMATA's waiver of sovereign immunity. Petitioner was permitted to argue that WMATA lied, concealed and misrepresented. And it made those very arguments to the jury. Petitioner had its day in court. The Petition does not present any good reason to give Petitioner another opportunity to reargue its case.

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7. Petitioner argues that it was improper for the D.C. Circuit to use the FTCA discretionary standard as a tool in assessing whether the challenged activity was governmental because "[n]ot all discretionary decisions are governmental, and not all governmental decisions are discretionary." Pet. at 15. In so arguing, Petitioner ignores the test employed by the D.C. Circuit in this case. As the D.C. Circuit made clear, not all discretionary acts enjoy immunity. *See* Pet. App. 10a-11a. Rather, for other than quintessential governmental functions, the court employs "a two-part test culled from the FTCA". Pet. App. 10a. Governmental discretionary acts that are not "grounded in 'social, economic, or political goals'" are not protected by sovereign immunity. *Id.* at 11a. The test employed by the D.C. Circuit was consistent with the WMATA Compact.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

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